



Administrative Tribunal

Distr.: Limited
30 September 2003
Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1113

Case No. 1213: JANSSEN

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President, Mr. Mayer Gabay, Vice-President;
Ms. Brigitte Stern;

Whereas, on 20 December 2000, Johannes Janssen, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 July 2001, the Applicant, after making the necessary corrections, again filed an Application, requesting the Tribunal:

“(a) To find that the Respondent did not apply due process regarding the budgetary recognition of the level of the post that the Applicant was encumbering as of 1 September 1989, by repeatedly and deliberately not seeking approval of the General Assembly for budgetary upgrading of the post, although the classification of the post of Chief, Governmental Publications Unit had been approved in 1985 through the statutory procedure.

(b) To find further that the Respondent acted in arbitrary and discriminatory fashion, thereby violating the principles of equal pay for equal work, when not reacting to repeated suggestions made from various competent ... administration offices to ... Headquarters, of using available vacancies for the promotion of the Applicant.

(c) To find also that the Administration violated the obligation of due diligence ...

(d) To decide that the Administration pay the Applicant retroactively the difference in salary, allowances and other entitlements between his actual level and grade until his promotion to the P-3 level on 31 December 1998, and the level of the post that he had been encumbering since 1 September 1989, including a lump sum corresponding to the application of a rate of interest of 5% to all increases in net pay that would have occurred during that period, if the Respondent had applied due diligence.

(e) To decide further that the Administration pay the Applicant a sum in the amount of three months net base salary, in compensation for the damage done to the career prospects of the Applicant as a result of the belated promotion of the Applicant."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2002 and once thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 19 March 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Conference on Trade and Development (UNCTAD), Geneva, on a short-term contract at the G-3 level, as a Library Clerk, on 10 September 1973. After a number of extensions, his appointment was made permanent on 1 June 1979. During the period relating to the instant Application, he held the P-2 level post of Chief, Governmental Publications Unit, Acquisitions and Cataloguing Section, Conference Services Division/Library, United Nations Office at Geneva (UNOG).

On 4 August 1982, a request for reclassification of the post of Chief, Governmental Publications Unit, was submitted by the Conference Services Division. Classification was approved at the P-3 level on 25 January 1985, but budget approval for the post was never received.

Effective 1 September 1989, the Applicant made a lateral move to the post. On 14 July 1992, he was informed that, although the post had been classified at the P-3 level, it remained budgeted at the P-2 level and that no P-3 post in the Library was available against which a special post allowance (SPA) could be paid.

From 19 October 1992 until 6 May 1994, the Applicant served on mission detail in South Africa. On 1 April 1993, he was awarded an SPA to the P-3 level.

On 3 August 1995, the Applicant wrote to the Chief, Personnel Service, UNOG, requesting, that "the administrative decision approving the P-3 level ... be

retroactively implemented as per 1 September 1989 and that [he] be equally granted the thereto related seniority and annual step increments”.

On 12 April 1996, the Applicant asked the Personnel Service, UNOG, for a reply to his letter of 3 August 1995, “to enable me, if necessary, to lodge an appeal under the provisions as set forth in Staff Rule 111.2”. On 15 July 1996, the Chief, Personnel Service, advised the Director, CSD, that an urgent solution to this problem should be identified, in order to avoid Joint Appeals Board and/or Administrative Tribunal procedures. In his response of 27 August 1996, the Director, CSD, advised that the Applicant’s post had been abolished as of 1 January 1996 and “he [had] stopped exercising his former functions”.

On 14 October 1996, the Chief, Personnel Service, requested a new job description for the post, as well as five others which had also been classified at a level higher than that the budgetary level over a decade earlier.

On 12 February 1997, the Chief, Personnel Service, urged OHRM to accommodate the Applicant without further delay. The Assistant Secretary-General for Human Resources Management subsequently advised the Director, CSD, in a memo dated 24 February as follows:

- “1. [...] Acceptable solutions are available to provide a post for [the Applicant] at the appropriate level and such arrangements should be enacted as soon as possible.
2. The case has been reviewed by the Rules and Regulations Unit of the Office of the Assistant Secretary for Human Resources Management. Based on the circumstances as noted, the non-provision of a post for the staff member would appear indefensible by the Administration, should this case proceed to the [Joint Appeals Board (JAB)] and the Administrative Tribunal [...]”

On 15 April 1997, the Chief, Personnel Service, replied that the Applicant could be promoted against a frozen P-3 post if, in turn, the Applicant’s current post could be frozen. He noted that both these posts were “earmarked for discontinuation” with effect from 1 January 1998, and it was expected that the Applicant could be absorbed by CHR, where he was temporarily assigned”.

On 21 November 1997, the Director, CSD, informed the Director, Division of Administration, that no solution had been found for the Applicant once his post was abolished and requested assistance in commencing the administrative procedures for

terminating his contract. On 19 December, the Chief, Personnel Service, replied that, as the Applicant was not prepared to accept an agreed termination, a "suitable placement" had to be found for him.

On 11 August 1998, the Applicant requested permission to submit his case directly to the Tribunal. On 16 September, the Applicant's request was refused on the ground that there were factual issues to be established in his case. Accordingly, his request was treated as one for administrative review.

Pursuant to a recommendation from the Chief Librarian to promote another staff member to the P-3 level, on 6 November 1998, the Chief, Personnel Service, stated that the Personnel Service was unable to support his recommendation given that the Applicant had been performing functions classified at the P-3 level for several years and that no resolution had been found in his case.

On 28 January 1999, the Applicant lodged an appeal with the JAB.

On 1 February 1999, the Chief, Personnel Service informed the Chief Librarian that as the Library had two vacancies at the P-3 level, the Personnel Service intended to submit promotion recommendations for both the Applicant and the staff member recommended by the Chief Librarian. On 24 February, the Deputy Chief, Personnel Administration Section, submitted the Applicant's case to the Appointment and Promotion Committee (APC) UNOG, and indicated that HRMS recommended that the vacancy announcement be exceptionally waived and that the Applicant be promoted with effect from 1 January 1999, the date on which a P-3 post had become available. On 18 March 1999, the Appointment and Promotion Board approved the Applicant's promotion. The Applicant was promoted to the P-3 level with the functional title of Librarian, effective 1 January 1999.

The JAB adopted its report on 22 August 2000. Its conclusions and recommendation read, in part, as follows:

"Conclusions

126. ... [T]he Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the situation of discrepancy between the level of classification and budget of the Appellant's post.

127. The Panel ... finds it highly regrettable that at no time from 1986-1987 biennium until the 1994-1995 biennium, was the budget for the

reclassification of the Appellant's post included in the proposed programme budgets submitted by the Secretary-General.

...

Recommendations

130. The Panel recommends that the administration pay the Appellant in compensation the difference in salary, allowances and other entitlements at the P-3 level, at the appropriate step, and the lower grade post he occupied, from 1 September 1989 until his promotion to the P-3 level on 31 December 1998."

On 4 June 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General considers that, even if a P-3 post had been requested from the General Assembly and the Assembly's approval for such a post had been obtained, it does not necessarily follow that you would have been automatically promoted to that post. In accordance with the Tribunal's jurisprudence, as is pointed out in the Board's report, the classification of a particular post is altogether different from the promotion of its incumbent, whose promotion to the higher level depends on the outcome of the regular review process.

In considering the Board's recommendation that you should be compensated for the higher-level functions you performed, the Secretary-General observes that the Board erred when it found that you were performing such functions for seven years, as the record indicates that you did not perform those functions when you were on mission assignment ... from 19 October 1992 through May 1994 and, of course, after the post was abolished on 1 January 1996. However, irrespective of how long you actually performed those functions, the Secretary-General considers that the decision to compensate staff for performing higher-level functions is discretionary and subject to the availability of a post. In the absence of an available post in this case, there is no abuse of discretion in deciding not to pay such compensation. Moreover, para. 7 of administrative instruction ST/AI/277, which is applicable to this case, indicates that, in the context of an upward post reclassification, it is permissible for an incumbent to continue to be remunerated on the basis of the incumbent's lower grade even though the level of the post is higher.

In light of the above considerations, the Secretary-General cannot accept the Board's recommendation for compensation. However, taking into account the totality of circumstances in this case, the Secretary-General agrees with the Board that the Administration was obligated to find a solution to the discrepancy between the level of the functions and the budgetary level of the post and that it should do so in a timely manner. Acknowledging that such a timely solution was not found in your case, he has decided that you should be compensated in the amount of three months net base salary."

On 23 July 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Budgetary approval was never sought to upgrade the post.
2. The Applicant's rights of due process were violated by the actions of the Respondent.
3. There is no evidence to suggest that the Applicant would not have been promoted to the post, had it been upgraded.
4. The Respondent violated the Applicant's right to equal pay for equal work. Further, there were P-3 posts that could have been used to fund the Applicant's promotion.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion, *a fortiori* to retroactive promotion, or to compensation at the promotion level.
2. Additional budgeting had been requested for the Applicant's post, but had not been granted. Even if additional funds had been budgeted for the Applicant's post, the Applicant would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty.
3. The inability to provide budgetary support for the Applicant's post was not improperly motivated.
4. The award of an SPA is discretionary and the Applicant had no right to compensation at the higher level.

The Tribunal, having deliberated from 7 to 24 July 2003, now pronounces the following Judgement:

- I. This is an appeal from the Secretary-General's decision dated 4 June 2001, rejecting the JAB finding that the Organization deprived the Applicant of just compensation by neglecting to obtain budgetary backing for the necessary upgrade to his upgraded post, or to find a suitable substitute higher level position.

II. The Tribunal has long recognized the broad discretionary power of the Secretary-General to promote qualified staff (see Judgement No. 1056, *Katz* (2002)). This power is governed by the strict application of procedural rules and regulations and has been limited in cases of abuse of authority, procedural or substantive errors or irregularities or violations of due process rights. The Applicant in this case urges the Tribunal to recognize that pursuant to the principles of equal pay for equal work, the Organization failed to fulfil its obligations to the Applicant in that respect.

III. On 25 January 1985, the classification of the post of Chief, Governmental Publications Unit, UNOG, was approved at the P-3 level. Despite requests for budgetary approval to implement this classification, such approval was not obtained at the time. On 1 September 1989, the Applicant was transferred to the post. He was told of the unimplemented classification, and advised that there was no other P-3 post in the Library against which he could be placed in order to receive a special post allowance or be promoted.

IV. On 3 August 1995, the Applicant wrote to the Chief, Personnel Service, UNOG, and requested that an administrative decision approving the P-3 level be retroactively implemented as of 1 September 1989.

V. After numerous exchanges between the Applicant and the Organization, in a memo dated 24 February 1997, the Assistant Secretary-General for Human Resources Management recommended to UNOG that a solution to the Applicant's situation be found immediately. On 15 April, the Chief, Personnel Service, UNOG, replied that they were agreeable to promote the Applicant against a frozen post. After months of communication between UNOG and OHRM, as no solution could be found, the Applicant's post was in the process of being eliminated.

VI. On 11 August 1998, the Applicant requested the Organization to implement the decision to promote him or, in the alternative, permit him direct access to the Tribunal. Having received no satisfaction, the Applicant, on 28 January 1999, launched his appeal with the JAB.

VII. On 24 February 1999, the Deputy Chief, Personnel Administration Section, UNOG, submitted the Applicant's case to the Chairperson of the APC, UNOG, and recommended that the Applicant be exceptionally promoted with effect from 1 January 1999, the date on which a P-3 post had become available. On 12 March 1999, the Assistant Secretary-General for Human Resources Management approved the promotion of the Applicant to the P-3 level, with effect from 1 January 1999.

VIII. On 22 August 2000, the JAB concluded that the Respondent had failed in his obligation to regularize the discrepancies between the level of classification and budget of the Applicant's post and recommended that the Applicant be awarded in compensation "the difference in salary, allowances and other entitlements at the P-3 level, at the appropriate step, and the lower grade post he occupied, from 1 September 1989 until his promotion to the P-3 level on 31 December 1998". The Secretary-General awarded Applicant three month net base salary, for the Respondent's failure to act in a timely manner. On 23 July 2001 the Applicant filed this Application with the Tribunal.

The Applicant's position is that the Respondent's decision-making process in this case was seriously flawed and manifestly in violation of the long-standing principle of the equal pay for equal work.

IX. The Respondent asserts that the Applicant did indeed receive full and fair consideration at every stage of the process and the inability to provide budgetary support for the Applicant's post was not improperly motivated. Furthermore, the Applicant could not have been promoted to his reclassified post without budgetary approval and even if obtained, the Applicant would necessarily have been subject to the regular promotion review process. Moreover, in the context of an upward post request for classification it is permissible for an incumbent to continue to be paid on the basis of his lower grade even though the level of the post is higher.

X. It is eminently clear that the JAB unequivocally supported the Applicant's position:

"126. ...[T]he Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the

situation of discrepancy between the level of classification and the budget of the Appellant's post."

...

128. It is regrettable that the situation lasted over ten years until the post was finally abolished, which of course did not erase the problem. For the [Applicant], since he took over the post in 1989, this resulted in performing for seven years the duties and responsibilities of a post classified at the P-3 level with a P-2 salary. After his post was abolished effective 1 January 1996, he was temporarily assigned to the Centre of Human Rights for a period of two years, before he was promoted to the P-3 level on 1 January 1999.

129. The Panel concludes that in this case the principle of equal pay for equal work in conjunction with the principle of due diligence had not been respected."

XI. The Tribunal has consistently held that the Respondent's discretionary powers to promote staff members are subject to Staff Regulation 4.2 and Article 101 of the Charter which states, "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity." (See Judgement No. 828, *Shamapande*, (1997) para.V). In order to achieve this purpose, "It is indispensable that 'full and fair consideration' should be given to all applicants for a post and that the Respondent bears the burden of proof with respect to this." (See Judgement No. 539, *Bentaleb* (1991) and *ibid*, para VI). The Tribunal agrees with the JAB conclusion that Respondent failed to demonstrate that Applicant was provided full and fair consideration and that Respondent adhered to the basic required rules.

XII. The Tribunal concludes that the Applicant is unquestionably entitled to equal pay for equal work, and sustained injury based on the commission by the Respondent of serious procedural mistakes. Consequently, the Tribunal holds that the Respondent's decision not to promote the Applicant violated the Applicant's basic rights. Therefore, the Applicant should be paid retroactively, the difference in salary, allowances and other entitlements between his actual level and grade at the time and the appropriate grade at the P-3 level, from 1 September 1989 until 31 December 1998 as well as the actual equivalent of the loss of pension rights as of September 1989.

XIII. In addition the Applicant should be compensated by six months net base salary for the delays and moral injury he suffered from the Respondent's failure to properly implement the classification of his post.

XIV. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant retroactively the difference in salary, allowances and other entitlements between his actual level and grade at the time and the appropriate grade at the P-3 level, from 1 September 1989 until 31 December 1998 as well as the actual equivalent of the loss of pension rights as of September 1989;
2. Orders the Respondent to pay the Applicant six months net base salary; and,
3. Rejects all other pleas in their entirety.

(Signatures)

Julio Barboza
President

Mayer Gabay
Vice-President

Brigitte Stern
Member

Geneva, 24 July 2003

Maritza Struyvenberg
Executive Secretary

//JANSSEN